

age of majority in each case but, with liberty to apply.

As to interest, the position in law is that special damages attract interest at the rate of 3% per annum from date of accident to the date of trial but no interest should be allowed for damages for loss of future earnings (*Murtadza bin Mohamed Hassan v. Chong Swee Pian*⁽³⁾). I therefore made a further order accordingly. It goes without saying that the judgment debt will also attract interest at the rate of 8% per annum from the date of judgment until satisfaction by virtue of the provisions of Order 42 rule 12 of the *Rules of the High Court, 1980*.

I lastly ordered the defendant to pay the taxed costs of this action.

Order accordingly.

Solicitors: *Chang & Vello; Bala Mahesan & Co.*

BRUNEI REPORT

PUBLIC PROSECUTOR v. NASAR BIN AHMAD & ORS.

[O.Cr. J. (Roberts C.J.) September 22, 1984]

[Bandar Seri Begawan – Criminal Trial No. 14 of 1984]

Penal Code (Brunei Cap. 22), ss. 34 & 375 – Rape and attempted rape – Common intention – Credibility of victim – Corroboration – Neutral medical evidence – Sentence – Penal Code (Brunei Cap. 22), ss. 34 & 375.

Evidence – Rape – Credibility of victim – Corroboration.

The first charge in this criminal trial alleged that all the three defendants raped the complainant Miss X, a 23-year-old divorcee and mother of two children at Meragang on July 16, 1984. The second charge alleged that D1 and D2 raped Miss X at Kampong Subok later on the same morning.

In respect of the second charge, she testified that she was subsequently driven by D2 to Kampong Subok, where D1 and D2 had sexual intercourse with her in a house against her will. She made her police report on the following day, shortly after midnight. She was medically examined about 48 hours after the rape was alleged to have taken place. The prosecution case on the first charge was corroborated by two independent eye witnesses. On the second charge, it had to rely on the evidence of Miss X alone.

A In their defence, D1 gave evidence on oath and D2 and D3 made unsworn statements from the dock. They all maintained that they never had intercourse with Miss X.

B Held: (1) on the first charge as in almost all sexual cases, the credibility of the victim is the most important single issue to be determined. Miss X was a credible witness;

(2) it is dangerous to convict on the uncorroborated evidence of the complainant. PW5 and PW7 saw Miss X unclothed and each of the three defendants having intercourse with her on the front seat of the Mazda against her will. The medical evidence must be regarded as neutral;

C (3) D1 and D3 were convicted of rape, and D2 of attempted rape. Section 34 of the Penal Code is not applicable;

(4) D1 was sentenced to 7 years' imprisonment, to begin at the end of sentence in case No. 1512/84. D2 was sentenced to 5½ years, with effect from July 20, 1984. D3 was sentenced to 4½ years, with effect from July 20, 1984;

D (5) D1 and D2 were acquitted of the second charge although it was open to the learned Judge to convict them.

CRIMINAL TRIAL.

E *Ivan Leong* (Deputy Public Prosecutor) for Public Prosecutor.

Accused in person.

Cur. Adv. Vult.

F Roberts C.J.: *Preliminary.* The three accused are charged with the rape of a woman who is referred to in the evidence as Miss X, though her real name is contained in the charges and has been identified by the various witnesses as they gave evidence.

G The first charge alleges that the three defendants raped Miss X at about 1.30 in the morning on July 16, 1984 at Pantai Meragang, Muara. The second charge alleges that Nasar (D1) and Suhaili (D2) raped the same woman later the same morning in a house at Kampong Subok.

H There were originally six young men who were thought to have been implicated in these offences. In addition to these three defendants, Haji Morni bin Haji Mahrop (P.W.5) and Tuah bin Haji Timbang (P.W.7), both of whom were called as prosecution witnesses, were charged with these defendants, but released by the magistrate when the prosecution offered no evidence against them. Jurol, a brother of D2, is also named in the charge. However, the police have not been able to arrest him, although they have searched for him.

During the course of the trial, the earlier

charge against the defendants, which accused them of raping Miss X at Meragang Beach and at Kg. Subok, was altered, with leave, so that the three defendants face a charge of rape at Meragang and only D1 and D2 face a separate charge of rape at Kg. Subok.

General matters

Sitting alone without a jury or assessors, I have reminded myself of various matters which, if I had been directing a jury, I would have explained to them in suitable detail.

- (a) The Prosecution must establish its case to such a degree that I am satisfied so as to be sure of the guilt of each accused.
- (b) The evidence on each charge must be considered separately.
- (c) The evidence against each defendant must be separately considered.
- (d) The evidence of D1, who chose to testify, must be approached in the same manner as that of any other witness. The unsworn statements of D2 and D3 should be given appropriate weight.
- (e) Corroboration of the evidence of the complainant ('Miss X') must be looked for. It is open to me to convict in the absence of such corroboration, but this is a dangerous course.
- (f) That the evidence given by D1 is evidence both for and against D2 and D3. The unsworn statements of D2 and D3 cannot be treated as evidence against D1.

Evidence of Miss X

Miss X, the complainant in both charges of rape, is a woman of 23, who has been married, has given birth to two children and has been divorced. Her evidence is, of course, the cornerstone of the prosecution case and I must summarize it now.

She described how Suhaili (D2) called for her in a Mazda car just before midnight on July 15. She said she had known him for about two years. He said he had something important to tell her and invited her to go out with him in his car. So she did.

Suhaili first of all drove to the Gerai in Bandar

A Seri Begawan, where he had a conversation with Nasar (D1) who was there with D3, Jurol, Morni (P.W.5) and Tuah (P.W.7).

B Suhaili (D2) then drove the Mazda to Muara followed by a Honda Civic car driven by Jamil (D3). At Muara, Miss X dropped Suhaili (D2) outside Muara Camp and drove into the camp to give a message to L/Cpl. Yussof, leaving D2 at the bus stop. When she came out of the camp, she stayed in the driver's seat, because she thought that D2 had drunk too much and looked unsteady.

C The Honda was then waiting at the bus stop. D1 got out of it, walked over to the Mazda and asked Miss X to take Suhaili home.

D She drove off in the Mazda and saw the Honda following her. She went towards the Muara filling station. Before she got there, the Honda passed her and cut across her front so that she had to stop. D1 got out of the Honda, and led D2 from the Mazda to the Honda where he left him. D1 returned to the Mazda, pushed Miss X to the passenger seat and drove off. She asked where they were going and said "just follow," which I take to mean "do what I say."

E Miss X objected and asked to be taken home, but he ignored her and drove the car to Meragang beach, followed by the Honda.

F When they got to the beach, D1 said to her, "you had better surrender" which she thought meant he wanted to rape her.

G She asked him why he wanted to do that to her, but he pushed down the lever of the passenger's seat in the Mazda, so that the seat fell flat.

H D1 then took off all her clothes and his own and began kissing her body. She objected to this and struggled. As D1 was undressing her, Jurol came and helped him by pushing at her shoulders.

I D1 opened her legs. She said that she fought back but that he put his private parts into her private parts, using force. She was not willing and she was crying. She pleaded with him, saying, "If your sister was treated like this how would you feel?" She said, "Don't do that," a number of times.

After D1 had finished raping her, he got out of the car and lay on the bonnet, saying to his friends, "What are you waiting for. Go ahead then."

Jurol, who is not charged, then raped her. As he did so, Tuah (P.W.7) came close to the car. She appealed to him to help and take her home, but he said he was afraid of Nasar (D1).

Jurol was followed by Jamil (D3) who also had sexual intercourse with her against her will in the Mazda. She said she pushed him back.

While Jamil raped her, Morni (P.W.5) came close to the Mazda, but said he would not help her as he was afraid of Nasar.

Jamil got out of the car and Suhaili (D2) got into it. She told D2, "What is the use of me being alive if you have all treated me like that."

D2 asked her to suck him and she refused saying she wanted to go home. He pushed her down, kissed her body and tried to put his private parts into hers. This he was not able to do, because he failed to develop an erection. He used his finger to push open her vagina and tried to push his organ into her but failed.

D1 asked Suhaili why he was taking so long. She managed to push D2 off and dress herself, finding her clothing on the roof of the car. She got into the Mazda again with Nasar and Suhaili. She asked Suhaili to take her home but he refused and drove her to Kg. Subok, where Suhaili opened a door and let them into the house.

Nasar held her hand hard and told her to enter the house. He took her upstairs and into a room where there was a mattress. She tried to get out from the window, but Nasar pulled her back and told her not to try to run away.

Nasar next pulled off her skirt and clothes. She fought back and ran round the room, but Nasar pushed her to the ground, pulled off her pants, bit her neck, pulled open her legs and forced his way into her, although she tried to push him off, and did not consent.

Soon after, D2 knocked at the door, which D1 opened. D2 came into the room and took off his clothes.

She asked D2 to take her home and said, "Don't treat me like that".

She tried to put her clothes back on but Suhaili grabbed them away from her. She pushed him away but he held on to her and masturbated

until he was erect. He pushed her to the mattress, opened her legs and entered her. She did not want him to do this.

Afterwards they both dressed and left the building, where Tuah was waiting outside.

She got into a Datsun car with D1 and Tuah. She asked them to take her home but D1 drove the car to a house near the airport which he entered. She got out of the car while he was away and ran off but Tuah came after her and brought her back, on D1's instructions. Tuah said he was afraid of Nasar, when she asked him to take her home.

The 1st defendant then drove her to near her house. She got out of the car and ran. Shortly after, she went to report to the Bandar Seri Begawan Police Station but at the gate she saw the 1st defendant in his car. He told her that if she reported the matter to the police, he would kill her.

She was very frightened and took a boat to Labuan where she spent the night, thinking about how to make a report. She returned on the 17th and went to the Dairy Farm in Bandar Seri Begawan where she stayed till 6.00 p.m. She went home, took a bath and reported to Bandar Seri Begawan Police Station. The officer there did not record her complaint but sent her to Muara Police Station, where she made a report to Sgt. Jaludin shortly after midnight.

After the rape, she cleaned herself with a swab and some antiseptic, as she was afraid of getting a disease from intercourse with the various men.

She said she had known Suhaili for two years before the evening in question and had been friendly with him as he had sponsored her passport. She had met Jamil two days earlier. She had not met Nasar, Morni or Tuah before.

She had not had sex with any of the accused before the morning of July 16.

Evidence of Two "Independent" Witnesses

The prosecution's case on the first charge does not rest wholly on the evidence given by the victim (Miss X). It is strongly supported, if they are believed, by that of the two eye witnesses of the rape, Haji Morni bin Haji Mahrop, aged 20 (P.W.5) and Tuah bin Haji Timbang, aged 27 (P.W.7).

On the second charge however, the prosecution has to rely on that of Miss X alone, since P.W.5 went home after the incident on the beach and Tuah says that he waited outside that house at Kg. Subok and did not know what was happening inside it.

P.W.5 and P.W.7 were both at the Gerai, late on the evening of July 15 with D1, D3 and Jurol, when D2 appeared in a Mazda car, accompanied by Miss X.

It was suggested by Suhaili (D2), whom they knew, that the five men should follow the Mazda, which they did, to Muara in D3's Honda. When they arrived, they found D2 alone, outside Muara Camp waiting for Miss X. Soon after she emerged in D2's car, picked him up and drove away. After a while, D1 asked D3, who was driving the Honda, to overtake the Mazda and stop it. D3 did so, whereupon D1 got out, and climbed into the Mazda, telling the others to follow him. D2 joined the others in the Honda.

P.W.5 described how, when the two cars reached the beach, all of them got out of the Honda and went towards the Mazda, where Miss X was raped by the three defendants and Jurol.

P.W.5 said that he remained three feet away from the Mazda and wanted to see what was happening. He took no part in raping her and gave no assistance to those who did. He admitted that he did not try to stop the rape because he was afraid of being beaten up by D1. He did not know that anyone wanted to rape her until all got to the beach and started to do so.

P.W.7's version of events is essentially the same as that given by P.W.5. His evidence is also to the effect that D3 was driving the Honda and D1 was driving the Mazda, alone with Miss X, when they reached the beach.

P.W. 7 was about two feet away from the Mazda, watching Miss X being raped through the open doors. He was too frightened of being beaten up to take any action to help the girl. He confirmed that he took no part in the rape and did nothing whatever to help those who did rape Miss X. Nor did he realize that rape was intended until he arrived at the beach and saw it happen.

I accept that neither P.W.5 nor P.W.7 did anything to assist those who raped Miss X and that they had no reason to believe, before they reach-

A ed the beach and saw D1 taking off Miss X's clothes, that anything wrong was likely to occur. At worst, they were interested and passive, if weak-minded spectators who took no part in the sexual assaults on Miss X and never intended to do so.

B This conduct is not to their credit, but merely watching, without encouragement or help, does not make a watcher into an accomplice.

C I find that P.W.5 and P.W.7 were not accomplices, and that their evidence, if accepted, can amount to corroboration of that of Miss X.

Medical Evidence

I must regard the medical evidence as neutral.

D Dr. U.M. Lister, Specialist Gynaecologist at the RIPAS Hospital, examined Miss X at 0215 on July 18, 1984, which was about 48 hours after the rapes were alleged to have taken place.

E The doctor found a 1½" bruise on the side of the neck, a mark 1/8' long on the left forearm and a ½" mark on the left knee. There were no injuries or marks on chest, abdomen or lower back.

F Vaginal examination showed a loose vagina such as would be expected for a woman who has had children, as Miss X had done before her divorce.

G The doctor's opinion was that a woman who had given birth might show no signs of being raped, even if some force had been used. She found no evidence of any trauma in that area.

H The absence of sperm from the swabs taken from Miss X was to be expected 48 hours after coitus, as all sperms are likely to disappear in this time even if the victim had not washed or cleaned herself, as Miss X asserted that she had done with a swab and some native disinfectant.

I The three small marks or bruises found on Miss X, at the neck, wrist and knee did not suggest any pattern of conduct to the doctor.

So there was nothing in the physical examination of Miss X which lends support to her evidence — nor indeed anything which weakens it.

I therefore discount it; as amounting to any corroboration of Miss X's story.

Defence (1st Defendant)

Nasar (D1) elected to give evidence, Suhaili (D2) and Jamil (D3) to make an unsworn statement from the dock, having been warned twice that the weight to be attached to an unsworn statement would be less than to evidence on oath which has been subject to cross-examination.

D1 testified that he joined D2, D3, Jurol, Morni and Tuah at the Padang after 9.00 p.m. on the evening of July 15. Suhaili left them saying he would meet them later at the Gerai.

D1 went there with the others; and Suhaili (D2) and Miss X arrived in a Mazda car driven by D2. Miss X asked them to follow her to Muara where there was a party at the flotilla camp. So D1, D3, Jurol, Morni and Tuah got into a Honda car, driven by D3, which followed the Mazda.

At Muara, they found D2 on his own at a bus stop near Muara Camp. D1 got out of the Honda and suggested to D2 that he should go home. D2 asked him to wait. After half an hour Miss X arrived and said there was no party, whereupon D1 suggested that they drove back. She drove the Mazda away with the Honda following behind.

At Kota Batu, the Mazda stopped as did the Honda. The 1st defendant got out of the Honda. The 2nd defendant came out of the Mazda and told him that Miss X wanted to meet him, so he went to the Mazda and got into the passenger seat.

The Honda drove off first, followed by the Mazda, to Meragang beach where both cars stopped.

When they arrived there, Miss X called him out of the car and sat on the bonnet with D2 and Tuah. There then followed a general conversation, during which Miss X asked him to beat up one of her friends.

The party was on the beach for about 15 minutes only. During this time nobody had intercourse with Miss X and nobody made any physical advances to her.

When they left the beach, D2 drove the Mazda to Sumbiling, with Miss X, Tuah and himself. There, Tuah left the Mazda and got into a Datsun, belonging to D1, and followed the Mazda, driven

A by D2 to a house near Kg. Subok. The house was still under construction. D2 was working on it and knew how to get in.

B D1 had said that as it was so late, he wanted somewhere to sleep for the rest of the night before returning to his home at Seria and D2 had suggested that they go with him to a place he knew.

C At Kg. Subok, D1, D2 and Tuah went into the house with Miss X. He slept in one of the upstairs rooms with Tuah. D2 and Miss X went to another room together.

While they were in the house, he did not have intercourse with Miss X, nor did he try to do so. Nor did he see anyone else doing so.

D D1 left in his car with Tuah and Miss X at about 6.00 a.m. and drove to the house of a relative. He left Tuah and Miss X alone in the Datsun for about five minutes. When he came out of his relative's house, he drove her home. She got out of the car and disappeared. He did not see her again until after he had been arrested, when he saw her at Bandar Seri Begawan Police Station.

E He repeated that neither he nor anyone else in his presence had had sexual intercourse with Miss X that night with or without her consent. And added that if he had raped her, there would have been marks on her body.

F When asked why Miss X should fabricate such a terrible story against him, he said that Miss X had a gang of girls with whom he had had trouble when one of them cheated him out of a gold chain.

G So far as Morni was concerned, he had not met him before and would only suggest he was drunk on the evening of July 15.

H Tuah had been a friend of hers but had a grudge against him and Tuah and his group had beaten him up previously.

Defence (2nd Defendant)

I Suhaili (also known as Suhil or Suhai) in his unsworn statement described how he met Miss X in the Dairy Farm by chance on the afternoon of July 15. She asked him to come and see her that evening at her house as she had something to talk to him about.

During the evening, after he met D1 and D3 at

the Padang, he remembered Miss X's invitation and went to her house in his car.

When he arrived, she asked him to take her to Muara, where there was a party in the camp. He agreed to go and she drove his Mazda car. They stopped at the Gerai, where Miss X told D1 they were going to a party at Muara.

When the Mazda arrived at Muara, Miss X left him at the bus stop while she went into the camp to find out about the party. Before she returned, half an hour later, D1 and the others arrived in the Honda. Miss X arrived back and said there was no party, so D1 suggested they should go home.

Miss X drove the Mazda away, with him as passenger. After a while, she said she wanted to discuss something secret with D1 and stopped the Mazda. He got out, saying he did not want to get involved in that discussion, and went to the Honda, which drove off to the beach, with the Mazda following.

When the cars stopped on the beach, he got out of the Honda and went to the Mazda, where he sat on the bonnet and had a conversation with Miss X. Tuah and D1 joined them and Miss X asked D1 to beat up a girl named Zaini. He suggested they should go home and drove away in his Mazda to Bandar Seri Begawan to pick up D1's car, a Datsun. Tuah got out of the Mazda and drove the Datsun behind the Mazda. He (D2) took them to a house at Kg. Subok, which he could get into because he was working there.

He did not rape Miss X in the house. She asked him to "play with her" but he refused because she had given him syphilis when she had had intercourse with him before. She became angry and told him, "You make me feel ashamed."

The next morning she refused to accompany him but went off with D1.

Defence (3rd Defendant)

Jamil, in his unsworn statement, described how he was at the Gerai on the evening of July 15 with Jurol, Morni and D1 waiting for a boat which would take them to listen to a band, when Miss X arrived, driving a car. D1 asked her where she was going. She said there was a party at Muara.

He (D3) went to get his Honda and drove it to Muara, where they found D2 at a bus stop.

A When Miss X arrived there, half an hour later, D1 got out of the Honda and suggested that Miss X should take Suhaili (D2) home.

B On the way back towards Bandar, Miss X, who was driving, stopped the Mazda. D1 went from the Honda to the Mazda and D2 changed from the Mazda to the Honda.

Both cars went to the beach, where D2 got out of the Honda.

C He (D3) did not see anything happen on the beach, though he was there for 15 minutes, after which he got back into his car and returned home.

Credibility of Miss X

D As in almost all sexual cases, the credibility of the victim is the most important single issue to be determined.

E Miss X, who is 23, gave her evidence in a calm and assured manner. She did not seem to be unduly disturbed by questions of an intimate or embarrassing nature. She did not seem to be a woman who would easily panic or lose control of herself.

F When deciding whether or not I could accept her evidence, I considered various matters which might lead me to doubt her honesty or reliability.

G It might seem as if Miss X was taking something of a risk by going out at midnight with a young man. But I accept her explanation that she trusted him, that she was grateful to him for acting as her sponsor, and that she had no reason to expect that she would be subject to any sexual advances.

H I give attention to the medical evidence, which showed no marks of any significance on her body, such as might have been expected if she had put up a vigorous fight, save perhaps for a mark on the neck which she said was caused by D1 at the house, not to her resistance on the beach.

I Her explanation was that she was pressed down by her shoulders by one of the man and that her hands were held, either by the man raping her or by one of the others each time she was raped, so that she was unable to struggle very much.

I noted that her clothing, which she handed to the police on July 19, is not damaged, except that

the bar, into which the waist buckle of her trousers fits, was missing.

It is not unknown for serious charges of a sexual nature, particularly allegations of rape, to be fabricated for a variety of reasons. Indeed, that is why the law requires corroboration of a victim's evidence. D1 suggested that Miss X had lied against him because he had had trouble with her gang of girls a few weeks before. D2 said that he had refused her invitation to have intercourse with her because she had given him syphilis and that she was angry. D3, whom Miss X said she had only met two days before, offered no explanation.

The offences took place between about 1.30 and about 6 o'clock on July 16. Miss X appears to have made no complaint to anybody until she reported to the police at Bandar Seri Begawan Police Station on the evening of July 17th. She was immediately sent to the Muara Police Station, as her main complaint appeared to relate to an incident in that area.

I admitted evidence of this complaint, taking the view that, at the time she made it to Sgt. Jaludin, at about 0030 on July 18, there was no police investigation in progress, since an investigation does not commence until the police have received information relating to an offence, and a police officer has reason to suspect that an offence has been committed. So a first report to the police precedes an investigation and is not rendered inadmissible by section 117(1) of the C.P.C.

I note in passing that section 117 in general seems to impose unnecessary restrictions on police officers and may sometimes also produce unfairness to an accused, and I suggest that consideration might be given to modifying it on the lines of the English law on the subject.

The complaint, which Miss X made, is in far less detail than the evidence which she gave, but it does not differ from it in any important respects.

Miss X gave an explanation of why she did not make a report much earlier. She said she made her way to the Police Station to do so, soon after D1 took her home on the morning of July 16, but she was seen by him and threatened. She felt frightened and went to Labuan for the night. Next day she returned. She sat in the Dairy Farm for some time thinking about how to report,

before going home, taking a bath and going to the Police Station.

I have considered whether the interval between the incidents and her report might indicate not fear, or shame or hesitation, but a period during which she was deciding to make up her story against the defendants. But I do not believe that this was the case.

Many factors are at work in the decision of a victim to report a rape, among them, perhaps, are shame at what happened, anxiety that her reputation will be ruined, however innocent she may have been, apprehension at the reactions of her family and friends and fear of reprisals by those responsible. A weighing of these matters may well cause delay in making a complaint. I accept her explanation of how it was that she took so long to report what had been done to her on the early morning of July 16.

I do not believe that she carefully fabricated, as the defence alleged, such grave charges against four innocent young men. Such a course would also mean that she would have had also to have persuaded Morni and Tuah to support her false story and there has not been any suggestion that this might have occurred.

In the end, having given careful thought to these factors, to her general manner in the witness box and to the contents of her evidence, I find her to be a credible witness, in relation to her version of events on the night of July 15 and 16.

Corroboration

I have already noted that it is dangerous to convict on the uncorroborated evidence of the complainant in a sexual case and I have therefore looked for such corroborative evidence.

I have already said that I discard the medical evidence, which lends no support to Miss X's story.

Similarly, I discount as corroboration the complaint which she made to the police. This can be taken into account only in considering the consistency of the story she has told and is relevant only to her credibility.

In relation to the first charge, there is abundant supporting evidence from both Morni and Tuah that all three defendants were present at the beach, where the first offence is said to have been committed.

Each of them, with only such minor discrepancies and variations as might be expected of witnesses recalling a somewhat confused and shocking series of events, gave clear evidence of seeing Miss X unclothed and of each of the three defendants, plus Jurol, having intercourse with her on the front seat of the Mazda against her will.

So far as the second charge is concerned, there is no corroboration of her story since Tuah said that he saw nothing of what went on, after they reached the house at Kg. Subok.

When approaching the evidence of P.W.5 and P.W.7, that is Morni and Tuah, I reminded myself that, although they were not accomplices in law, I must consider their testimony with suspicion, since they were earlier charged jointly with the defendants and it might be said that they had fabricated or exaggerated their evidence in order to attempt to evade prosecution themselves.

D1 suggested that Morni (P.W.5), whom he had not met before, must have been drunk and that Tuah, whom he said was a friend of his, had a grudge against him, even though they had gone out together on July 15. Neither D2 nor D3, in their statements, suggested any reason why Morni (P.W.5) and Tuah (P.W.7) should have told such damaging lies against them.

Nor can I see any reason why they should have done so. Having heard the evidence from Morni (P.W.5) and Tuah (P.W.7), I found them to be nervous and fairly simple witnesses, who were doing their best to tell the truth when describing a situation which did not show either of them in very good light and I accept their evidence as reliable.

Defence

I have set out in some detail the substance of the evidence given by D1 and of the unsworn statements of D2 and D3 and I have asked myself whether they raise in my mind any doubt as to their guilt.

So far as D1 is concerned, I had the benefit of being able to observe the manner in which he gave his evidence. He seemed to me to be a man of forceful character, who might well dominate a group of young men, as indeed the prosecution evidence suggests. I judge him to be capable of the ruthlessness, violence and insensitivity which have attributed to him.

A I did not believe the substance of his evidence.

Now were any doubts raised in my mind by the unsworn statements of D2 and D3, which were not subject to the test of cross-examination and to which, in any event, I would have given less weight than to evidence on oath.

B Neither the contents of these statements, nor the manner in which they were given, impressed me and I reject these statements as untrue.

C Under section 375 of the Penal Code, the prosecution must prove that the accused –

(a) had sexual intercourse with the woman;
(b) in circumstances falling under one of five descriptions, among them it was

(i) against her will;
D (ii) without her consent;
(iii) with her consent, when her consent has been obtained by putting her in fear of death or of hurt.

E The note to the section says that penetration is sufficient to amount to rape – so that it is not necessary for there to have been any ejaculation by the man.

I accept Miss X's evidence that D1 and D3 penetrated her against her will and without her consent on the beach, and that they did so in spite of her struggles, protests and crying. They could not have thought that she was consenting.

F I find her evidence to be supported in its essentials, both that she was raped and that the defendants were implicated in it.

G I make the same findings against D2 subject to the question of whether what he did amounted to rape or attempted rape.

H This is not one of those cases in which the defence is that the woman consented. The defence is that nothing of the kind described by the girl took place at all and that nobody made any physical advances to her, nor had sexual intercourse with her, with or without her consent on the beach or in the house. As indicated I believe her, and I disbelieve them and I convict both D1 and D3 on the first charge.

Rape or attempted Rape by D2

I As to D2, however, the question arises as to whether he achieved penetration of Miss X on the beach.

She gave evidence that D2, having taken off all his clothes, asked her to suck him, which she refused to do. He then pushed her down, kissed her body and tried to put his private parts into hers. He was not successful because his penis did not erect.

She added that his private parts touched the edge of her vagina and that he used his finger to try to push his organ into her but was unsuccessful. D1 then asked D2 why he was taking so long and she then managed to push D2 away.

Both Morni and Tuah testified that D2 moved his body up and down on top of Miss X. From this they must have inferred that he was having intercourse with her, though they are unlikely, in such circumstances, to have been able to see where his penis was.

I am not satisfied that D2 achieved penetration of Miss X, though I am sure that his penis touched the outside of her vagina, and that he intended to have intercourse with her, knowing that she did not consent.

Not only did he intend to rape her, he undressed himself, lay on top of her, and tried to push his penis into her. He only failed because he was unable to achieve an erection.

It may be, although this is speculation, that his failure was caused by the amount of drink which he had taken earlier in the evening, though I reject any suggestion that he may have been too drunk to appreciate what he was doing or to form the necessary intention to commit the crime of rape or of attempted rape.

I find that his acts were sufficiently proximate to the complete offence of rape to amount to an attempted rape.

Section 34

Counsel for the Public Prosecutor submitted, however, that D2 could properly be convicted of the full offence of rape, by reason of the provisions of section 34 of the Penal Code which says that where a criminal act is done by several persons, in furtherance of the common intention of all, each is liable for that act in the same manner as if the act were done by him alone.

If there was evidence that there had been any agreement between the three defendants to take Miss X to the beach and rape her, or that D2 had actively assisted D1 or D2 or Jurol in raping Miss X, I think the section would avail the prosecution.

But there is nothing to suggest that anyone except D1 had thought about raping Miss X until they reached the beach. Indeed it seems likely that D1 was the moving spirit, and that only after he had finished with Miss X and asked the others to take a turn did it occur to them to do so.

When D2 tried to rape the girl, he was not, as I see it, furthering any common intention but satisfying his own desire only. It is worth nothing that he was the last of the four to do so.

There was no evidence that he had assisted any of the others, though Jurol and Nasar seem to have done so.

I, therefore, remain in doubt as to whether D2's actions fall within section 34 and I do not convict him of the full offence of rape but of attempted rape under the first charge.

The second charge

When convicting the three defendants under the first charge, I reminded myself that it was dangerous to convict on the uncorroborated evidence of a complainant in a sexual case. I looked for corroboration and found it in abundance on the first charge.

The only evidence which supports her evidence on the second charge is that of Tuah, to a very limited extent. He says that he saw her enter the house at Kg. Subok with D1 and D2 after they had driven to the house from the beach.

When they entered the house, he said that Miss X was not crying, struggling or shouting, though she seemed to be distressed and was being firmly held by D1 as she entered the house.

Thus Tuah's evidence does no more than put D1 and D2 in the house with Miss X, during the period when she says she was again raped by them.

D1 says that he spent the night in a room with Tuah and had nothing to do with Miss X in the house.

D2, in his statement, admits that he slept in the same room as Miss X but denies having physical contact with her, though he says that he rejected her advances.

Nor can any corroboration be found from anything which was said or which occurred the following morning, when Miss X was driven home by D1.

It might perhaps be argued that it was less likely that Miss X, having been worn down by her earlier experiences, could renew her resistance in the house, since on her own evidence, D1 and D2, when they raped her in the house, received no assistance from anybody else.

I should make it clear that in coming to the conclusion which I do on the second charge, I do not, in any way, disbelieve Miss X's evidence either on the first charge or on the second charge. But it is dangerous to convict on unsupported testimony from a victim. There is no such corroborative evidence on the second charge and although it is open to me to convict, nonetheless, I am not prepared to adopt such a course in the light of the evidence on the second charge and of the circumstances surrounding it.

Accordingly I acquit both D1 and D2 of the second charge.

Sentence

This is a disgraceful crime, as gang rape always is. It involves for the unfortunate victim, fear, shame, brutality, damage to her reputation, and the considerable ordeal of having to give evidence, in this instance on two separate occasions, and being questioned at length and in detail on matters of an intimate nature.

This is at least the fourth occasion in 1984 when young men had been convicted of gang rapes on girls. The sentences in the other cases are all ranged between 7 and 8 years and, in those cases, none of those convicted (and they were all convicted after trial) had any previous convictions. These sentences could, therefore, be said to have set a normal standard sentence which should be considered in rapes of this nature, even where the convicted persons were as young as 16.

For what it is worth in favour of the defendants, I accept that this is not a gang rape that was carefully planned before it was executed.

So far as Nasar is concerned, I accept that it was only when he took over the driving wheel and drove Miss X to the beach that the intention to have intercourse with her arose in his mind. I will infer in favour of D1 and D2 that it was only when they saw D1 and Jurol stripping the girl, that they decided to join in.

D1 is nearly 24 and he already has 12 convictions, the first of these when he was 16, when he was sentenced to six months' imprisonment for

- A theft; in 1979, he received 9 months for a crime of violence, voluntarily causing hurt; in 1982, he was sentenced to 10 months' imprisonment for unlawful carnal knowledge of a girl under the age of 16; in 1984, he received a sentence of three months' imprisonment for an offence under the
- B Misuse of Drugs Enactment.

I regard him as the ring leader and the dominant partner in this gang rape. Without him, I suspect that there might have been no rape at all.

- C For these reasons, bearing in mind his leading role and his very bad record, he must receive a heavier sentence than the others, and will go to prison for seven years. This sentence will begin at the end of the sentence imposed under the conviction for the Misuse of Drugs Enactment, that is Case No. 1512/84.
- D

D2 was convicted only of an attempt. He is aged 26 and he has one previous conviction almost five years ago for theft in a dwelling house. The maximum sentence for an attempt under section 511 of the Code is half the longest term which can be imposed for the full offence.

- E This indicates that in ordinary circumstances an attempt should be treated as being less serious than the full offence.

- F As against this, D2 knew her quite well and had been friendly with her, and was trusted by her so that his conduct could be said, in this respect, to be worse than that of D1, who had never met her before, and D3, who hardly knew her at all.

- G That he failed to rape her was due solely to his physical inability at the last minute, and not to any change of mind.

- H Giving weight to these factors and in particular to my view that he was not the ring leader, I sentence him to five and a half years' imprisonment, to run from July 20, 1984.

- I D3 is the youngest of the three. He is only 21 and he has only been in Brunei since July 7. So far as is known, he has no previous convictions and I think he joined in rather than played any leading part in the rape.

I am giving him due allowance for his clean record and his age. I sentence him to four and a half years' imprisonment. That will also run from July 20, 1984.

Sentenced accordingly.